United States Department of Labor
Employees' Compensation Appeals Board

J.B., Appellant	)	
and	)	**Docket No. 17-1672**
	)	**Issued: December 28, 2017**
DEPARTMENT OF VETERANS AFFAIRS, RECORDS CONTROL DIVISION, St. Louis, MO, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 1, 2017 appellant filed a timely appeal from a March 7, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

[1] In a decision dated March 16, 2017, OWCP reduced appellant's compensation to zero as his actual earnings as a file clerk effective October 18, 2015 fairly and reasonably represented his wage-earning capacity. Appellant has not appealed this decision and thus it is not before the Board at this time. *See* 20 C.F.R. §§ 501.2(c) and 501.3.

[2] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that appellant submitted additional evidence on appeal. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board. 20 C.F.R. § 501.2(c)(1).

ISSUE

The issue is whether appellant has more than 12 percent permanent impairment of the right lower extremity, for which he previously received a schedule award.

FACTUAL HISTORY

On March 11, 2015 appellant, then a 42-year-old laborer, filed a traumatic injury claim (Form CA-1) alleging that on February 23, 2015 he fractured his right ankle in the performance of duty. OWCP accepted the claim for a closed right ankle fracture and right ankle dislocation. Appellant stopped work on February 23, 2015 and received wage-loss compensation from OWCP beginning April 10, 2015. On April 7, 2015 Dr. David K. Karges, an osteopath, performed an open reduction and internal fixation of the right lateral malleolus.

Appellant returned to part-time limited-duty employment on July 21, 2015 and to full-time modified employment on September 28, 2015. On October 14, 2015 he accepted a position as a scanner/indexer.

On March 11, 2016 appellant filed a claim for a schedule award (Form CA-7). On March 25, 2016 OWCP advised him of the type of medical evidence needed to establish a claim for a schedule award.

In a permanent impairment worksheet dated August 1, 2016, Dr. Karges identified the diagnosis as a class two right ankle trimalleolar fracture. He applied a grade modifier of two for functional history, physical examination, and clinical studies, which he found yielded two percent lower extremity impairment. Dr. Karges further found no ratable impairment due to a peripheral nerve injury and two percent impairment due to loss of ankle motion, for a total combined lower right lower extremity permanent impairment of four percent.

An OWCP medical adviser reviewed the evidence on August 13, 2016 and noted that Dr. Karges' impairment worksheet was not accompanied by a medical report or an explanation of the impairment rating. He noted that the physician found two percent impairment due to the diagnosis-based rating for a class two ankle fracture, which he found was not possible given that the impairment range for a class two ankle fracture was 19 to 25 percent under Table 16-2 on page 503 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[4] The medical adviser also indicated that appellant had no peripheral nerve injury according to November 23, 2015 clinic notes, and that a September 28, 2015 clinic note showed only a minimal loss of dorsiflexion for ankle motion.[5] He recommended a second opinion examination.

By letter dated October 18, 2016, OWCP referred appellant to Dr. Richard T. Katz, a Board-certified physiatrist, for a second opinion examination. In a report dated December 1, 2016, Dr. Katz diagnosed a right trimalleolar fracture and dislocation. He noted that x-rays

[4] A.M.A., *Guides* (6th ed. 2009).

[5] In a progress report dated September 28, 2015, Dr. Karges found that appellant had good ankle motion with full plantarflexion and dorsiflexion to five degrees.

obtained on November 23, 2015 revealed no hardware loosening and satisfactory healing of the fracture. Dr. Katz discussed appellant's complaints of continued pain that varied with activity and noted that pain sporadically interrupted his sleep. On examination, he found mild swelling of the right ankle and measured range of motion as 0 degrees dorsiflexion, 40 degrees plantar flexion, 20 degrees inversion, and 20 degrees eversion. Dr. Katz further found a negative anterior drawer and varus stress test, normal alignment of the heel, a negative tarsal tunnel and no pain over the posterior tibial tendon or on palpation of the metatarsal heads and interdigital nerves. He opined that appellant reached maximum medical improvement on November 23, 2015. Using the A.M.A., *Guides*, Dr. Katz identified the diagnosis as a class one trimalleolar fracture with mild deficits in motion, which yielded a default value of 10 percent. He applied a grade modifier of two for functional history based on appellant's answers to a pain questionnaire and a grade one modifier based on the physical examination, to find 12 percent permanent impairment of the right lower extremity.

An OWCP medical adviser reviewed the evidence on January 17, 2017 and concurred with Dr. Katz' impairment rating. He found that 40 degrees plantar flexion, zero degrees dorsiflexion, and 20 degrees eversion yielded no impairment, and 20 degrees inversion yielded two percent impairment according to Table 16-20 and Table 16-22 on page 549 of the A.M.A., *Guides*, for a mild impairment due to loss of range of motion.[6] The medical adviser concurred with Dr. Katz' finding that the ratable diagnosis was a class one right ankle trimalleolar fracture with good alignment and mild range of motion deficits as set forth in Table 16-2 on page 503 of the A.M.A., *Guides*, which yielded a default value of 10 percent. He applied a grade modifier of two for functional history due to appellant's continued symptoms and a grade modifier of one for physical examination findings of mild swelling and mild motion loss. The medical adviser noted that clinical studies were used to determine the diagnosis and thus were not used again as a grade modifier.[7] Using the net adjustment formula, he found that the default value should be moved one place to the right for 12 percent right lower extremity impairment.

By decision dated March 7, 2017, OWCP granted appellant a schedule award for 12 percent permanent impairment of the right lower extremity. The period of the award ran for 34.56 weeks from December 2, 2016 to July 31, 2017.

On appeal appellant argues that his schedule award was insufficient given the extent of his injury. He asserts that OWCP's medical adviser was biased against him in rating his injury as mild. Appellant describes the effect of the work injury on his life and activities of daily living. He challenges that physician's finding that he did not have pain lying down or sleeping. Appellant notes that his physician told him he will have arthritis due to his ankle injury.

LEGAL PRECEDENT

The schedule award provision of FECA,[8] and its implementing federal regulation,[9] set forth the number of weeks of compensation payable to employees sustaining permanent

[6] A.M.A., *Guides* 550, Table 16-25.

[7] *Id*. at 519.

[8] 5 U.S.C. § 8107.

[9] 20 C.F.R. § 10.404.

impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[10] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[11]

In determining impairment for the lower extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the lower extremity to be rated. With respect to the ankle, the relevant portion of the leg (foot) for the present case, reference is made to Table 16-2 (Foot and Ankle Regional Grid) beginning on page 501.[12] After the Class of Diagnosis (CDX) is determined from the Foot and Ankle Regional Grid (including identification of a default grade value), the net adjustment formula is applied using the grade modifier for Functional History (GMFH), grade modifier for Physical Examination (GMPE), and grade modifier for Clinical Studies (GMCS). The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[13]

ANALYSIS

OWCP accepted that on February 23, 2015 appellant sustained a closed right ankle fracture and dislocation. On April 7, 2015 he underwent an open reduction and internal fixation of the right lateral malleolus.

Dr. Karges provided a worksheet rating appellant's permanent impairment. He found that appellant had two percent impairment due to his right ankle trimalleolar fracture and two percent impairment due to loss of ankle motion, for a total right lower extremity impairment of four percent. Dr. Karges, however, did not provide examination findings or otherwise explain his impairment rating, and as such it is of little probative value.[14] Further, he combined a diagnosis-based impairment rating method with the range of motion method. Range of motion, however, is primarily used as a physical examination adjustment factor for lower extremity impairment ratings.[15] If range of motion is the most appropriate mechanism for grading the impairment, it is a stand-alone rating used when other grids provide for a rating based on range of motion or no other diagnosis-based sections for rating the lower extremity impairment are applicable for impairment rating of a condition.[16]

[10] *Id*. at § 10.404(a).

[11] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013).

[12] *See* A.M.A., *Guides* 501-07.

[13] *Id*. at 515-22.

[14] *See Patricia J. Penney-Guzman*, 55 ECAB 757 (2004); *Robert B. Rozelle*, 44 ECAB 615 (1993).

[15] A.M.A., *Guides* 497, section 16.2.

[16] *Id*. at 543; *see also D.F.*, Docket No. 15-0664 (issued January 8, 2016).

Upon the recommendation of OWCP's medical adviser, OWCP referred appellant to Dr. Katz for a second opinion examination regarding the extent of any permanent impairment. Dr. Katz diagnosed a right trimalleolar fracture and dislocation and noted that appellant continued to experience pain with activity and pain that periodically interrupted sleep. He measured range of motion as zero degrees dorsiflexion, 40 degrees plantar flexion, and 20 degrees inversion and eversion. On examination, Dr. Katz found a negative anterior drawer and varus stress test, mild right ankle swelling, normal heel alignment, and a negative tarsal tunnel test. Applying Table 16-2 on page 503 of the A.M.A., *Guides*, he identified the diagnosis as a class one trimalleolar fracture with a mild motion deficit, for a 10 percent default impairment rating. Dr. Katz applied a grade modifier of two for functional history based on appellant's pain questionnaire and a grade modifier of one for physical examination findings. Utilizing the net adjustment formula discussed above, (GMFH - CDX) + (GMPE - CDX), or (2-1) + (1-1) = 1, yielded an adjustment one place to the right and 12 percent permanent impairment of the right lower extremity.

An OWCP medical adviser reviewed Dr. Katz' opinion and concurred with his findings, noting that a grade modifier for clinical studies was not appropriate as it was used to identify the diagnosis. He further found that 40 degrees plantar flexion, zero degrees dorsiflexion, and 20 degrees eversion yielded no impairment, and 20 degrees inversion yielded two percent impairment using Table 16-20 and Table 16-22 on page 549 of the A.M.A., *Guides*. As noted, range of motion is primarily used in determining grade modifiers and, if a stand-alone rating, is not combined with the diagnosis-based impairment method.[17] The medical adviser determined that appellant had 12 percent right lower extremity impairment. The Board finds that the opinions of Dr. Katz and OWCP's medical adviser constitute the weight of the evidence as they properly applied the protocols and tables of the A.M.A., *Guides*.[18] The evidence establishes that appellant has no more than 12 percent permanent impairment of the right lower extremity.

On appeal appellant argues that OWCP's medical adviser was biased and a physician found that he did not experience pain sleeping. He did not, however, support his allegation of bias with any evidence or specific argument. The Board has held that allegations of bias by OWCP physicians must be supported by the record on appeal, and the current record does not support appellant's claims of bias.[19] Further, Dr. Katz discussed appellant's complaints of pain that intermittently disturbed his sleep.

Appellant also contends that his schedule award was insufficient given the effect of his injury on his life and activities of daily living. The amount payable pursuant to a schedule award does not take into account the effect that the impairment has on employment opportunities, wage-earning capacity, sports, hobbies or other lifestyle activities.[20] The number of weeks of compensation for a schedule award is determined by the compensation schedule at 5 U.S.C. § 8107(c). For complete loss of use of the leg, the maximum number of weeks of compensation

[17] *See supra* note 14.

[18] *See J.S.*, Docket No. 15-0663 (issued June 5, 2015).

[19] *See G.G.*, Docket No .12-1168 (issued February 25, 2013).

[20] *Ruben Franco*, 54 ECAB 496 (2003).

is 288 weeks.[21] Since appellant's permanent impairment of the right leg is 12 percent, he is entitled to 12 percent of 288 weeks, or 34.56 weeks of compensation. There is no current medical report of record supporting any greater degree of impairment under the A.M.A., *Guides*.

Appellant relates that his physicians told him he will have arthritis in the future. He may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant has no more than 12 percent permanent impairment of the right lower extremity, for which he previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the March 7, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 28, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

[21] 5 U.S.C. § 8107(c).